JOHN CORNYN
TEXAS

United States Senate

WASHINGTON, DC 20510–4305

March 23, 2005

Professor Susan Low Bloch
Georgetown University Law School
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Washington, D.C. 20001

Dear Professor Bloch,

I was delighted to receive last Friday your memorandum dated March 14, 2005. That memorandum, intentionally or not, illustrates precisely the point that my colleagues and I have been making for the last several months: that the current use of filibusters against judicial nominations is unprecedented and wrong, that it is important to restore Senate and constitutional traditions regarding the confirmation of judges by a majority vote – and that we should resolve these issues and then return quickly to the other important business of the American people, rather than allow the destructive politics that has infected the confirmation process in the past to fester and to continue on into the foreseeable future.

Your memorandum asserts that your views have been misrepresented by myself and others. I did cite your views in a law review article published in the *Harvard Journal of Law and Public Policy*, where I wrote that "Georgetown Law Professor Susan Low Bloch has similarly condemned supermajority voting requirements for confirmation, arguing that they would allow the Senate to by itself 'upset the carefully crafted rules concerning appointment of both executive officials and judges and to unilaterally limit the power the Constitution gives to the President in the appointment process. This, I believe, would allow the Senate to aggrandize its own role and would unconstitutionally distort the balance of powers established by the Constitution.'"

As I noted, this passage directly quotes your 1997 article in *Constitutional Commentary*. Both articles speak for themselves. After all, the scenario you envisioned and feared is precisely what is occurring today. The traditional right of Senators to engage in debate is being used today not to ensure full debate on judicial nominations, but instead to deny altogether an up-or-down vote to certain judicial nominees – in a clear, explicit, and unprecedented attempt to radically alter Senate tradition and the constitutional rule from a majority vote to a supermajority vote.

I am puzzled by the claim in your memo that "the time-honored use of a filibuster to allow senators to express their views and *to decide when to cut off debate and schedule a vote* is not equivalent to a rule change requiring a supermajority to 'confirm'" (emphasis added). As any reasonable observer of the Senate well knows, some Senators quite clearly have no interest in ever "cut[ting] off debate and schedul[ing] a vote." They are not trying to ensure full debate – they are trying to ensure that debate never ends. The clear and explicit objective of this tactic, of

course, is to ensure that the only way to confirm a nominee is with the support of a supermajority of 60 Senators. As the Senate Minority Leader himself has stated quite emphatically and dramatically on the floor of the United States Senate, "there is not a number [of hours] in the universe that would be sufficient" for some Senators to end debate on a judicial nominee.

I am also puzzled by the claim in your memo that "[e]veryone agrees: Senate confirmation requires simply a majority. No one in the Senate or elsewhere disputes that." If only that were true! Unfortunately, it is not. Some Senators are clearly trying to alter the constitutional rule from the "majority" that you claim – quite rightly – is indisputable, to a 60% supermajority requirement that you have previously condemned in your scholarship. As the Senate Minority Leader said just last month in remarks to the press: "It's always been a 60-vote for judges. . . . Go back many, many, many years. Go back decades and it's always been that way." Likewise, Senator Edward M. Kennedy, a leading Democrat member of the Senate Judiciary Committee, has made clear his view that "the Founders did not say, and did not mean that 'the President can appoint whomever he wants to the Federal courts, as long as he gets a bare Senate majority to consent.' If we did adopt a rule that allowed the President to do so, the Founding Fathers would look down on us and say, 'Shame!'" Senator Tim Johnson has similarly stated on the Senate floor that "the Democratic Party is insisting that one should not go to a lifetime Federal bench unless there is a generally broad consensus, bipartisan consensus, not unanimous but a broad consensus, of at least 60 votes." Senator Charles Schumer has even gone so far as to suggest that he is not "aware of any words in the Constitution that say there should be a majority vote for judges." And just last week, Senator Barbara Boxer told a MoveOn.Org audience that "we're saying we think you ought to get nine votes over the 51 required. . . . There ought to be a super vote."

It seems to me that these Senators *do* dispute your contention that "Senate confirmation requires simply a majority." Yet your memo stated quite emphatically that "everyone agrees" and that "[n]o one in the Senate or elsewhere disputes that." I assume that you were unaware of these passages at the time you wrote your memorandum. I hope that, in your pursuit of intellectually rigorous scholarship, you will consider the passages that I have taken the time to bring to your attention here, and I invite you to join the effort to restore the confirmation standard and the Senate and constitutional traditions that you have defended in your previous writings.

Sincerely,

JOHN CORNYN
United States Senator

cc: Members of the Senate Committee on the Judiciary